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BOOK REVIEWS

PROPERTY RIGHTS IN THE MARKET

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I

ALMOST under our eyes a system of property is in the making. It emerges as all such usages do out of a series of expediencies. Claims are asserted without the law or even against its command. If for a time they endure without serious challenge, they come to be accepted by the parties immediately concerned and to be enforced by the group's discipline. In due course, through one device or another, they win the recognition of the state which puts its own police power behind them. The institution comes into being without the question of its establishment even being formally raised. The latest among such works of anonymous authorship is the pattern of property rights in the market.

The rise is the more notable because "we the people" have highly resolved that the institution should never be. We have, in a long chapter of legal history, attempted to outlaw all such privileges before they could be asserted. In our cultural background lies much experience with the corporation[1] which has asserted dominion over an exclusive area in the economy. And, whatever the form—the guild, the worshipful company, the patent of monopoly, the expression of the King's pleasure—we have looked upon it and found it bad. The common law long ago proclaimed the right of every man to the trade of his choice. The general power of utter letters of monopoly was abolished when the royal prerogative was abated into orderly government. The Constitution of the United States takes it for granted that the Congress can confer no exclusive rights; its only specified exception is in respect to writings and discoveries—and then for "limited times" only.[2] And our antitrust acts, translating ancient right into public policy, outlaw all contracts, combinations, and conspiracies which seek to

[1] The word corporation is used here in its primitive meaning, that is, a group of persons acting as a unit. The corpus was widely employed before the charter from the state gave it legal sanction.

[2] Article I, section 8, subsection 8.

impede the domestic freedom of trade.[3] Even when the legislature decrees exceptions, as for farmers and laborers, its avowed intent is to do no more than strengthen an inferior bargaining position. It is careful to specify that the indulgence is not to be carried so far as "substantially to lessen competition" or to induce monopoly.[4]

The law, of course, cannot prevail if it stands alone. It is obeyed if it accords with the urges and usages of society. It is avoided when the conditions of life impel the actions of men in a contrary direction. In the nineteenth century the cases and the statutes marched along with prevailing opinion. The most reputable of beliefs was the separation of the state and the economy. It enjoyed such prestige as to find expression, not in one, but in several articles of faith—in the norm of individualism, the theory of laissez faire, the Newtonian order of classical economics. Even a deistic trend in theology proclaimed the capacity of the universe to look out for itself. And when biology pulled off an intellectual revolution, the doctrine of the survival of the fittest saved from blasphemy a proclamation that the human species is of animal origin. The law was at peace with the criteria of success in a competitive struggle. This rational system, comprehending all aspects of our culture, has not yet spent its force.

All of this was—and to millions of people still is—not an apology for privilege but a picture of a going society. It was—and is—not a theory of private gain but of the common good. If the state was not to invade its province, business was not to be left without order and office. Its affairs were to be regulated not by the government, but by the market; not by an alien control, but by an agency shaped to the very task. If, however, it was to be overlord to the economy, the market must be open to all who had occasion to use it and free from influence by every private and public interest. In a rivalry of seller against seller and buyer against buyer, prices were to be fixed, goods to be exhanged, dooms to be passed. The rules of men were not to intrude with favor or handicap. There were to be no liberties, save the liberty of the individual unfortified by privilege to fend for himself. And there could be no rights of property—lest, with its regulatory office corrupted, the market betray its trust.

[3] The Sherman Act, July 2, 1890, c. 647, 26 Stat. 209; the Clayton Act, Oct. 15, 1914, c. 323, 38 Stat. 730; the Federal Trade Commission Act, Sept. 26, 1914, c. 311, 38 Stat. 717.

[4] Note among others Capper-Volstead Act, Feb. 18, 1922, c. 57, stat. 388; Fisheries Cooperation Marketing Act, June 25, 1934, c. 742, 48 stat. 1213; Packers and Stockyard Act, Aug. 15, 1921, c. 64, 42 stat. 159; Federal Power Act, June 10, 1920, c. 285, 41 stat. 1063.

The law has not changed; its intellectual foundations are little shaken. There can be no property rights in the market, yet the thing which could not be has somehow come to pass. A barrier mighty enough to withstand a frontal attack has not been able to resist the staccato beat of instance after instance.

II

An ancient urge beats, as in a million other cases it has beaten, against a legal taboo. An individual may court danger; the group is likely to seek security. And, even when men of daring come together, sooner or later they seek to be vested in their adventure. The urge to escape all that threatens is not a matter of period, locale or stage of culture. The ancient bond of community is well understood in most societies. The corporation—whether of small boys or learned men, craftsmen or merchants, ascetics or racketeers—is limited to the elect. Its members preempt and share its opportunities, perquisites and privileges. It may be a trade union of holy men, paupers in person and by vow, but not without well-defined equities within the order. It may be a guild organized to the glory of God, the manufacture of a useful good, and the pursuit of gain, whose station in life has been detailed in an elaborate ordinance. It may be a worshipful company into whose exclusive custody the state has entrusted all authority in respect to the affairs of some industry. But whatever the form, the collect hold their liberties as against outsiders and individuals are blessed with their privileges by virtue of belonging. And charity, useful enough as between the annointed, does not extend to the brother who makes trouble or to the alien who would barge in. To cut corners, clip prices, contrive a new craft, invent a novel article of faith is "to chisel"—and within the fraternity "to chisel" is the mortal sin.

Among us such an urge has not been quenched by legal mandate. Against the trends of economic change the demand for security has become more insistant. It may be all right for a person to crush the rival who lacks resources with which to put up a fight. But, as between equals, it seems foolish to compete; it is far better to put to use the power of the adversary to harm and molest. So all through the economy the gentlemen of a trade strive to find ways of working together. Beggars are vested with their corners and learn to enforce their own law of trespass. Newsstands move towards a political system; a code of rules determines the order in which rival papers are displayed; the circulation managers of the various sheets must be acceptable to the czar of the industry. The gathering of waste-paper has its hierarchy of handlers, its functionaries with

their rightful dues, its code of business ethics. A concern has the legal right to choose its own customers—and exercises it against retailers who tend to get out of line. A trade carves out a "legitimate" channel of marketing—makes it hot for all who attempt short cuts. A company fixes its own prices—and others act on their own initiative when they "follow the leader." And members of an industry, moving onward and upward, reach out for knowledge and understanding by grouping themselves into associations and institutes. There is surely no legal objection to the men of steel or copper or aluminum meeting to exchange views on the masterpieces of art—and it is only natural that, when they have so much in common and meet so rarely, they should linger for just a moment over more secular affairs. In a hundred ways and at a hundred points, parties in interest move towards a quiet accord which in time may grow up into a united front.

No fanfare of trumpets heralds such moves; nor is the law in its awe and majesty prepared for a trend which comes by stealth. It is nobody's business to inform public officials of all intercourse among corporate executives. The gesture towards union may ripen into an interlocking of companies before the question of legality is ever raised. An interest which offends may have too much influence in high places to be attacked. Or a negligence, natural or studied, may attend enforcement. A resort to the law to balk an industrial accord is an intricate and treacherous maneuver. The strategy involves many moves; the ordeal, feasting upon procedural questions, may run its course before the issue of substance is ever raised. At the end a legal triumph may fail to arrest the trend towards brotherhood. Special circumstances may decree exceptions which in time will undermine the judgment. The letter may be observed, yet an escape found from the form of the words. A legal result may be set down and later neutralized through a daring move by the offender. If a group wishes to be vested in an industrial estate, it need not despair. Courage, diligence and intelligence may be a match for the law's command. Barriers, however firmly they stand, do not block the way around.

An old adage has it that he who flouts the law should act in the name of the law. If a group has a situation well in hand, it may ignore the statutes and forget the cases. But, if it lacks power to police its own commands, a sanction from the state may come in handy. In its name the man who fails to obey the code of the industry may be dragged into court for a breach of the law. The vagrancy acts are often invoked against the out-of-town union organizer. The cut-rate store just come to town has the ugly habit of taking up its domicile in a building which is a notorious

and then keeps "foreign" laborers and contractors away. The tax on oleomargine has proved to be rather efficient as a tariff wall about the cow and rather poor as a revenue raiser.[5] Inspection laws on their face insure to the people wholesome food; in practice they reveal a far greater purity in the local product than in that from a distance. The license to sell, the grant of patent, the right of copy, the trade-mark are among legal writs which in practice have dispayed a versatility little suspected by their authors.

Nor does the lack of a suitable sanction in itself spell defeat. Our legislatures are made up of reasonable men. They are, by presumption, competent in public affairs and solicitous to promote the general welfare. Upon them the arts of persuasion may be deftly plied. For a long time physicians and lawyers have sought to guard patients and clients against the unscrupulous practice of their callings. And of late morticians, photographers, beauticians, and even plain barbers have become much oncerned over the standards of their professions. As a result it has been enacted by a number of states that no one shall be admitted to public practice until his competence has been certified by a committee versed in the mystery.[6] And as trades become increasingly aware of their public callings, the number of such sanctions increases. If to get together is against the law, sanctions may be brought within reach with which to remove the curse.

III

Among such sanctions none is of universal value. It is a delicate task to give protective coloring to a system of marketing; and circumstance must guide the choice, elaboration and employment of the legal warrant. For the national economy is not a trim affair. The industries which make it up are a motley lot, unlike in size, structure, importance, office. They may run to many small, or to a few large, units. They may be concentrated within a narrow area or scattered across a continent. They may be sprawling confederations of business units or articulate corporate entities. In respect to technology or organization they may stand at different levels of culture. Each industry has its folk-ways, its intellectual climate, its conditions of operation. Over it tradition hangs heavy or light; its leadership may be sluggish, routine or resourceful. Prudence may counsel the daring of the lone wolf, an amelioration of the competitive struggle, the drive towards the united front. Yet, however mixed the motives which prompt, the trend

[5] *A. Magnano Co. v. Hamilton*, 292 U. S. 40 (1934).

[6] *The Legislative Monopolies Achieved by Small Business*, 48 *Yale Law Journal* 847 (1939).

from an open to a sheltered, and then to a closed market is usually opportunistic. Objective is generally clearer than plan; executives, in a series of moves, capitalize as well as they can on the course of events; it is only gradually that to their wishful eyes design takes shape.

The first simple move is to seize a strategic point. In the far-off later nineteenth century the robber baron, resorting to direct action, set out ruthlessly to obtain dominion over an area in the economy. If weak, his competitors became enemies to be crushed. If strong, they were bought off or reduced to fealty. They ceased to bother because they had gone out of business or were rendered harmless by the bonds of contract. The titan, whose will was his own law, created and enforced his own benefit of clergy. But now the business executive is civilized, skilled in finesse, anxious to travel with the law rather than to operate against it. He is suspicious of his own naked power, against which there may be rebellion; he is skeptical of contracts which the courts may hold void as against public policy. He knows the rule which cautions economy of means; he is careful to rest all dubious understanding upon sanctions which emanate from the state. The aim is to capture and fortify the position from which the domain is exposed; and then to impress a single will as far as it can be made to reach. The vantage point must, of course, be chosen with care. It will vary widely from industry to industry and even from time to time within the same industry. And the power which its seizure confers will depend on the actor as well as upon circumstance. A series of cases, taken from different industries, will reveal successive stages in the development of market property.

A trio of instances display the emergence of property rights in inchoate form. In the building trades a man must belong to the union if he is to secure work. But the closed shop does not insure employment; nor does the collective agreement, in specifying a wage rate, insure a minimum annual income. The protection which association offers is against the scab; the right conveyed is not in an estate but to an opportunity. The card of the union is a property; for it confers upon its holder the right of search for work where the person without it is excluded.[7] As the union grows strong it may make more substantial the privilege it creates. Among mine workers, where equal division is the rule, it insures to each member his

[7] A voluminous literature proclaims the value of collective bargaining in enabling the laborer to secure the competitive value of his services. There has been little discussion of the equities created when, through the bargaining position of his union, he can do rather better by himself than in an open market for his services.

fair share of total employment. Among locomotive engineers, where seniority prevails, workers are assured more regular employment and larger incomes with years of service. In like manner plumbers, teamsters, chiripodists, whose callings are open only to those who are licensed, have established closed clubs. The license is in itself an equity; it grows in value as the craft manages to keep its numbers down.

The medical profession presents a somewhat more intricate pattern. Its ranks are closed by rigid requirements of education and personal competence. Its field of opportunity is limited by the tolerance which the law accords to an assortment of cults. An ethical code, running centuries back, imposes upon the physician the Hippocratic oath; commands him to bestow his attentions according to human needs; forbids him to take advantage of the scarcity value of his services. The rise of specialties, the impact of a pecuniary society, and the habit of practice within a single income group has eaten away at these ancient precepts. The principle of assessment—"from each according to his ability to pay"—has forsaken the single price, established a "sliding scale" for medical charges, and endowed the calling with the right of private taxation. There are, moreover, perquisites which the caste officially can confer. Membership in the association, professional access to hospitals, the privilege of consultation are assets of consequence. The state regards the physician as occupying a public office and has delegated to the group a large power of discipline over its members. In general this power is held to be limited to technical competence and professional behavior. Yet on occasion the guild has interfered in economic matters and sought to control the form of organization under which medical services are marketed. It has required a decision of the Supreme Court to stop the American Medical Association from the use of unfair tactics to check the progress of "group health."[8] A detail of equities and responsibilities is needed to define in terms of property the doctor's access to his market.

The control of a strategic ingredient may be enough to command an industry. The morning newspaper, an everyday necessity, provides a case in point. If the newspaper is to carry on, obviously it must have access to the stream of news. To its operation news is as essential as editorial writers, printing presses, a delivery system, comic strips or advertsiing. And, just as obviously, it cannot send out a host of reporters to capture stories red-hot wherever they happen to break. Long ago the papers were driven to exchange "intelligence" with each other, and out of this commerce has emerged news-services. The most reliable and far-flung of these is the

[8] *American Medical Association v. U. S.*, 11 *U. S. Law Week*, 4147 (1943).

Associated Press. In recent years the United Press has been able to compete in the afternoon field; the International News Service, never a srious rival, can only offer supplementary material. A new paper, unable to secure an AP franchise, cannot hope to invade the morning field in competition with an established daily. Yet the newcomer is a stranger—and the AP operates as a gentlemen's club. Until recently an application for a franchise was referred to the party whom it most concerned, namely the member in the area which the new periodical proposed to cover. There was, of course, an appeal; the judgment on the spot could be reversed by a four-fifths vote of all the members. It was, however, nominal, rather than real, since the club was disposed to take the word of the gentleman who knew most about the character of the applicant. "A man's right to his trade," as the law puts it, was at the mercy of his competitor.

The surface of things, however, has been disturbed and the closed door has moved a bit on its hinges. The right of protest has passed out of the by-laws and into informal usage. A majority vote is now enough to take the novitiate in. But, so long as "senatorial courtesy" prevails and members are sensitive to the peril of a brother threatened with competition, the outcome has been little affected. Even if voted in, the stranger faces a serious handicap; for he must plank down for his franchise ten per cent of all his competitor has paid for news since the beginning of the century. And these sums are to be divided among the AP newspapers in the field and city which the new sheet is to cover. It may be that the courts will decide that the association is in restraint of trade and decree that it be converted into a genuine cooperative, with membership open to all upon the same terms. Until it does the owner of the morning newspaper in any large city enjoys a monopoly. The market is his; he can, so far as his circulation allows, fix his own price, decree full or meager coverage, give to the news whatever slant he will, and force his social views upon unwilling readers.[9] So long as he alone can get the news, he alone can retail it. In a host of "one-paper towns" the market is his to do with as he will.[10]

[9] *U. S. v. Associated Press,* a civil action now pending in the District Court of the United States for the Southern District of New York (1943).

[10] If space permitted, it would be interesting at this point to explore the emergence in somewhat more articulate form of property rights in the motion picture industry. There is hardly a usage of the trade that does not move towards an appropriation and division of the market. Note, for example, "clearance"—or the interval which must elapse after the "first run" before the picture can be shown in a "neighborhood house". It is obvious that as that interval is made long or short, it diverts patronage towards the down-town or towards the suburban theatre.

IV

It is a far cry from news to tin, but the technique carries over. The norm of a market is an affair of many sellers and many buyers, each anxious to deal, each insistent upon his own terms. If either is not satisfied with an offer, he has an opportunity to do better elsewhere. In tin the buyer still goes to market, for he must have the commodity; but there he has been stripped of his economic rights. To that end nature itself has skillfully set the stage. The ore—so far as pioneer work has revealed—is found in quantity, requisite purity and easy access only in Bolivia and "the British East Indies." In each of these territories the producers form a compact group; in neither is there an organized consumer interest. In Bolivia there is no consuming public; in the British East Indies it has been overseas and inarticulate. Thus a political frontier separates the two parties to the bargain of production and use.

The first duty of a country is to its own people. In the instant case the governments of Bolivia and British Malaya have been concerned to protect the producers and sellers, not the buyers and users. In each country —since local statutes do not forbid—a lock-step in respect to the terms upon which the ore is disposed of could be made to go of itself. But smelters might be erected abroad; and, against their encroachment upon the established industry, the producers needed official help. To that end an export tax on the raw material proved a great convenience. The foreigner, loaded down with a duty which the domestic processor did not have to pay, was unable to compete. At one time a United States corporation attempted to break the British-Bolivian hold. But no sooner was its plant ready to operate than export duties were raised and the venture had to be abandoned. Thus the American market was made the property of a union of large alien concerns. It was their estate to divide, to govern, to conserve as they pleased. Their governments lent their taxing powers to a cartel seeking to dominate our markets. Our government, seeking to protect its citizens who paid the bills, could exercise its controls only along the diplomatic front. Its most effective weapon was the "please" of protocol.

It is easy to pass from tin to natural rubber. The plant is indigenous to South America, but our Latin neighbors have never succeeded in making much of it.[11] In their stead the Dutch and the British have converted the shrub into the rubber tree. And, as our own national culture became nomadic and took to the automobile, the raw material for the tires came from Malaya. For a time the host of producers suffered the vicissitudes of the world market; then they resolved to control the ups and downs of produc-

[11] Imperial policies, as well as local conditions, helped to shape the result.

tion and price. A first attempt failed because the Dutch did not come in and the planters could not take the discipline. A second trial corrected error and capitalized upon unity in economic faith. The planting of trees was limited; production was reduced to a schedule; quotas were assigned to the plantations; all the factors in the equation of price were brought under control. And, lest individuals forsake the congregation, the governments were persuaded to underwrite the scheme. They lent their police powers—to arrest and punish unlawful planting, production, sale. And, to make certain that no other country should market natural rubber, a stern prohibition was laid upon the export of seedlings.

Here is a market in mutation—a hybrid affair of state and economy. It presents a situation beset with anomalies. A compact regulates the relation of competitors; the state polices a private government; the interests of buyers and sellers are mediated through diplomatic channels. To us the case of natural rubber has become notorious; for the great rubber-using country is the United States. Funds for support of the industry have come largely from us; yet we have had no control over price, the terms of sale, the output in prospect. Rights to our custom are assigned, not by our corporations and our government, but by honorable companies and their more honorable governments abroad. Alien states, without our leave, resolve into private equities an important American market. And against their creation of properties in our commonwealth we have neither effective recourse nor legal appeal.

It must, however, not be assumed that Americans are without guile in the use of such devices. A number of our domestic industries are highly localized. If our Constitution did not forbid, many a state in the union could serve itself and a local trade with an export tax. It could lend its sovereignty to regiment an industry which sold beyond its borders and collect its revenues from the peoples of other states. Since so simple a device is not within reach, our states have ingeniously grafted economic controls upon such legal sanctions as are available. As yet Michigan has not attempted to exploit the automobile to the advantage of the industry and its own treasury. But Florida has designed an intricate code of regulation whose effect is to "stabilize" the citrus fruit industry.[12] And many a state has employed its wide powers over the "liquor traffic" to prevent harm to a local monopoly by distilled spirits from over the border.[13] A

[12] *Mayo. v. Lakeland Highlands Canning Co.*, 309 U. S. 310 (1940).

[13] *State Board of Equalization of California v. Young's Market Co.*, 299 U. S. 59 (1936); *Indianapolis Brewing Co. v. State Liquor Commission of Michigan*, 305 U. S. 391 1939); *Finch and Co. v. McKettrick*, 305 U. S. 395 (1939); *Ziffrin v. Reeves*, 308 U. S. 132 (1939).

host of statutes are discovered to contain sanctions never tucked away between their lines. Fitted out with a purpose which was never a part of their intent, they implement a trend towards a local mercantilism. At least a score of the resulting designs are among the finest of the products of an art which is alike legal and acquisitive. Among these the case of "fluid milk" is outstanding.

An intricate scheme of industrial control springs from a simple legal usage. The inspection of milk is an exercise of the police power; its avowed purpose is the protection of the public health. Had there from the first been inspction by a federal authority, all milk eligible for sale would have gone into a national market. But at the time it seemed no concern of the federal, or even of the state, government and the city took over. Funds and personnel were limited; inspectors went out of town just far enough to assure to the municipality an adequate supply. As the authority of the city thus moved into the country, an irregular domain known as the milk-shed came into being. All milk produced within the area, which met the ordeal of inspection, was admitted to the market. All from without, no matter how free from harmful bacteria, was excluded. As cities have grown, their milk-sheds have not been correspondingly enlarged. As a result an open has become more and more a sheltered market.

Within the orbit of the milk-shed little has remained static. As the dairy has moved away from teh town, the middleman has appeared to mediate between the producer and his customers. Pasteurization has come along to add another precaution; the plant it demands is beyond the means of the ordinary vendor; distribution has become big business. And inspection, having set the stage and started the action, becomes the warrant for the creation of a political order. The distributors were to the farmers as the few to the many. If the producers were to secure a fair price, they had to resort to collective bargaining. But, since only those who survived inspection were recognized, the union became a closed club. A sense of solidarity and a consciousness of interest grew. The purity of the product ceased to be the only objective of policy.

An economic organization of the milk-shed was inevitable. In different areas the lines of the pattern diverge, but all are kindred editions of a basic design. A conscious attempt was made to restrict—the industry would say accommodate—daily supply to market demand. And that at a price which, minus the distributor's margin, would yield a "fair price" to the dairy-farmer. It is a delicate problem, for demand however steady has variations and a herd of cows, less steadfast over the months, cannot accommodate its yield to the vicissitudes of popular use. The answer—

made possible only by inspection—has been to measure off enough "fluid milk" for domestic consumption, and to sell the "surplus milk" for canning, drying, conversion into butter and cheese. Thus, although quarts for different uses are identical, a wall has been erected between two markets. Fluid milk is protected and for it a fixed price is maintained. Surplus milk is left to take up the shock of all that affects the market. If the total amount of fluid milk which goes to market is calculated, so must be the share which each farmer is to furnish. Quotas, based on some period in the past, are assigned as if by right. And, although the newcomer is not completely excluded, he can win admission only through an exacting apprenticeship. Over a period of years he must build up a record of supply in the surplus market before being admitted into the more exclusive ranks. The system, which has grown up under private auspices, has recently passed into the protection of the federal government. And now, through marketing agreements approved by groups of producers, the system of private government has the support of the federal police power.[14]

The result is a pattern of property with the sharpest sort of edges. It is true that no producer goes to market; that no one enjoys the right to supply a given group of households. For milk from various sources goes into a common pool from which quarts-in-bottles are ladled out for family use. But none the less, a system of rights is built up in respect to this pool; for collective agreement specifies the break-down into personal domains and the individual's equity is given finite definition. In a word, personal holdings accord with the law of the industry. There are, of course, the problems incident to a growing population and a falling demand. But the scheme is usually flexible enough to allow for such factors of growth and decay. If there is expansion, the rules specify where the gains are to go. If there is contraction, they determine how the loss is to be absorbed. And no system of property can give fixed values to its equities.

Yet the system falls one stage short of status. It has not yet been finally determined what happens to the dairyman's right of supply if he leaves the business. Is the quota—and the prerequisites which attend it—the possession-in-trust of the farmer, to be cancelled when he retires? If he goes bankrupt, are quota and membership to be included within the assets of the estate? Are they to be used to satisfy the claims of creditors? May they be appropriated by the state in satisfaction of taxes? Is the quota an equity that runs with the herd or goes with the land? Has it, like

[14] IRENE TILL, *Milk: the Politics of an Industry* (1938).

the AP franchise, grown up into a full-fledged chattel which freely is to be alienated?

Access to the market by license and quota is not limited to milk. It has been generalized into an institution under which our staple crops are being produced. Is the market for a raw material or an agricultural commodity, like realty and improvements, coming to be subject to title, possession, and usufruct? Are equities in such markets to be made transferable? And are these to be exchanges where shares in them can be bought and sold? Is there just ahead a curious phenomenon, alike feudal and corporate, of vendible equities in access to a closed market?

V

A docket of such questions needs to be taken to the grant of patent. For in articulate outline its pattern approaches most nearly the precisions of real property. And it now holds primacy among devices for staking out claims in the market. As we move from natural products to synthetics, the exclusive right in a technical process tends to replace other sanctions. There was once a quinine cartel, seated in Malaya, which used the good offices of its government to collect a toll from a malaria-ridden world. But chemistry, in the breakdown of coal-tar, chanced upon a substitute; and the single corporation which holds the patent for atabrine is in a position to levy a like toll.[15] As yet we do not know the future of the rubber plantations in the East Indies; but a synthetic substitute is far past the laboratory stage. It comes by way of three or four distinct processes; and just now there is a struggle, with patents as counters, to get control of a rising major industry. With "the progress of science and the useful arts," we may avoid an alien dominion; but the way around seems to lead, not to a free market, but towards a neo-feudal economy.

To catch in process a design of property based upon the patent grant it is well to begin with a specific case. In the recitation which follows each incident can be documented. Yet, in order that institutional analysis may not be deflected into a quest for personal guilt, it is better to substitute symbols for names. A chemical which had long been used as a dye was discovered to possess therapeutic properties. Since the patent had expired, the product and its process of manufacture were free to all who cared to employ them. The drug had not as yet been neatly adapted to its medical use and technicians began to work out variations on the original compound. Work went forward in several laboratories; a number of houses seemed destined presently to discover "the miracle drug." As an

[15] *Monopoly Over Malaria,* 2 MEDICAL CARE 111 (1942).

Act of Congress has it, the inventor who first achieved the result would obtain "the exclusive right" to manufacture and sell. Others could rejoice in a noble try or enjoy whatever privileges they could wangle out of the winner. But, when patient research pinch hits for a flash of genius, it is not easy to fix by a date the moment at which the discovery is made. And when a group of individuals together engage in an experiment, the personal inventor comes into his office by a legal fiction. Here the stage was set for a conflict within the Patent Office and a mighty bout at law in the courts. And from such a struggle—expensive, protracted, uncertain—executives of prudence pray fervently to be delivered.

If business houses are economic men, each may be expected to attempt to get the jump upon its fellows—and thus, by hastening to serve humanity, to collect its pecuniary reward. But in the instant case, the ruthless struggle for markets was softened by an urge towards Christian unity. The ABC company, intent upon its task in chemical therapy, learned that the DEF company was busied with the same problem. A meeting between officials was aranged; it was agreed that each was to push its patent claims and that the loser was not to contest the winner's grant. DEF, with the better laboratory, expected to succeed; ABC, with the superior sales organization, was in a position to make trouble. So, to subdue conflict into an accord, it was further agreed that the winner should license the loser "to make and vend," and that the loser should pay the winner a modest royalty.

Somehow the impending deal came to be noised abroad. The GHI and JKL companies had for some time been stumbling towards the drug. And, when they got wind of what was up, they came forward and asked to be taken into the alliance. A contract was accordingly drawn—to fix a single price, to divide the market four ways, to unite and appropriate. But before the contract could be signed and sealed along came five other companies—MNO, PQR, STU, VWX, and YZZ—all of which recited pioneer work and with proper plea and appropriate threat asked for shares in the joint adventure. So a new treaty, with the equities of the several parties all specifically written down, was drawn. And, even though each company secured only a fraction of what it wanted, all concurred in the result.

Such an understanding among competitors is not according to the books. Any one of them, without leave from any of the others, could have gone into production. If then it was sued for infringement, it had an excellent chance to break the patent. That done, it would have the right to make and vend the drug without peril, permit or tribute. Such an opportunity

was available to each of nine companies, yet no one of them took the way of individual initiative. Instead, with the chances eight to one against it, each deeded away its right of consent. The unorthodox behavior converged into a strange agreement. The lawyers for the several companies were to examine all the claims to the invention; only the single one which they found valid was to go to the Patent Office. There, unconfused by knowledge of what had gone on in eight other laboratories, the examiners would have no trouble in rewarding with a grant "the sole and true inventor."

The patent thus made valid was to sanction a close corporation. The patentee was to license each of its competitors to manufacture and sell the drug. For each a market was appointed upon which no other company could trespass. All were bound, not only to respect the government's grant, but to join in its defense against attack by any outside party. Out of respect for the law, none of the articles of agreement made mention of price-fixing. Instead it was silently agreed that the patentee was free to fix the price of his own product—and courtesy demanded of his own licenses that they should not undersell him. In the compact are practices which clearly lie beyond the tolerance of the statutes—but, if no one invokes it, the law cannot speak. In the common understanding which keeps it silent, the letter patent undergoes metamorphasis. The "exclusive right" no longer serves merely to secure to the inventor his reward. It becomes a warrant from the government, in whose name the honorable companies resolve an industrial domain into marketing estates. Each, immune to competition, lords it over its petty domain, subject to the privileges and strictures of the mutual accord.

VI

The letter-patent does not create the closed estate. It supplies the dubious, but rather effective, sanction by which the conscripted market is given legal protection and fortified against legal attack. A second case, again from the field of pharmaceuticals, reveals the institution in a later stage of development.

The invention of vitamin-therapy does not represent a blinding flash of creative genius. As is usual these days, the path towards it was being followed by a number of bio-chemists. A number of steps had already been taken. Then a researcher, building upon the work of his predecessors, sought and obtained a patent upon "his" process for impregnating food with ultra-violet rays. Where over the years a technology is developed by many persons, it is impossible to mark off with sharp lines an individual's contribution. And, when those who

have done the pioneer work seek no protection, the patent is likely to comprehend more than the inventor can rightfully claim. As luck would have it, through "inadvertance"—a word of omnipresence in the patent cases,—government's grant was written in no stingy language. Its terms were, in fact, so broad, that it became "a blocking patent;" that is, it lay across the channel along which experimental work would have to move. The patentee could employ his exclusive right to advance, impede, or halt every attempt to get ahead. He became the focus of a curious paradox. The very purpose of his "franchise" was "to promote the progress of science and the useful arts;" yet he could veto every advance which was not to his personal advantage.

In the instant case the patent was diligently exploited. It was assigned by the inventor to an Institute which proceeded to issue licenses for its use in sharply separated industrial areas. In "ethical drugs" it was in no position to play a favorite and a number of concerns were licensed to produce vitamin tablets for sale to the public. Although these houses sold in the same markets, ways were found to mitigate the severity of the competition. Although provinces were not sharply separated, it was against the code for any manufacturer to chisel or to quote uncanonical prices. At law the prices were decreed by the patent owner; in reality they represented a meeting of minds within the trade sanctified by the imprimatur of the Institute. In other domains it was the practice to grant a single "exclusive" license. Thus one company alone was endowed with the right to infiltrate milk with ultra-violet rays; a second was granted a similar privilege in respect to breakfast foods; a third was vested with a monopoly of the process in respect to bread. The breakdown of the market into proprietary domains was often quite specific. Thus one license was given in respect to food for horses; a second for cats, dogs, and wolves; a third for white mice. But even such particularity sometimes became too general for practical use. Thus a license was issued for the manufacture of cattle-feed, but the would-be user could not purchase without himself securing a license. In this it was set down whether the resulting milk was to enter "the fluid market" or was to be converted into a specified "surplus" commodity.

Here is a neatly regimented scheme of activities built about rights in a modern patent medicine which is good alike for man and beast. Save for a single popular field, its domains are marked out with great precision. Between them boundaries are fixed and effectively policed. All who are to make and vend hold their fiefs from a feudal lord. The privileges and obligations which attend vassalage are specified in minute detail. It was

necessary that a system of private government so nicely articulated should not go to pieces. To maintain discipline, the police power of the state was put behind the code of the commodity; and the offender was hailed into a court of law for an invasion of the rights of the patentee. And to reduce the problem of enforcement to its simplest terms, all of the licenses bound their beneficiaries not to challenge the validity of the basic patent. No branch of government operates with such neatness and dispatch.[16] The design for property is as functional, intricate, clean-cut as feudalism ever offered.

The example presents the type; the patterns vary greatly in line, usage, tie of fealty. A host of engaging specimens from the domestic economy may be put on exhibit. But the species is not limited to a single national habitat. A patent estate, or a confederation of them, moves easily into an international cartel, to which political frontiers are no more than boundaries between marketing provinces. A corporation, acting for inventors in its employ, takes out a series of patents on a technical process. It does this, not only at home, but in all the countries in which it expects to market the resulting product. The sum of these grants is in effect equivalent to a world franchise; and by doling out exclusive licenses in accordance with a plan of his own, the patentee may break down the world market into a series of fiefs. Each of these is then exploited upon his terms by licensees chosen by him. Or, two or more corporations in different lands may take out series of patents on technical processes which overlap or compete. They can, if they choose, take their several grants into the courts and for them secure—or lose—that ultimate validity which only the judiciary can confer. But, instead, they may prefer to enter into a convention, by which all whom the affair concerns accept at face value all patents in question. Then each of the parties may become the licensor as well as the licensee of all the others. It then becomes easy, as relative strength dictates, to resolve the globe into distinct spheres of influence. The meeting at Basle or Berne or Geneva, of an American, an Englishman, and a German, to determine who is to sell in Checko-Slovakia, Poland, Spain or Latin America, has become a familiar picture.[17] The sanctions brought to such a meeting are all of national origin; yet the market pattern which emerges is international.

[16] The patentee, in licensing concerns to enter the industry, does what the United States Supreme Court has forbidden a state in the union to do. *New State Ice Co. v. Liebmann*, 285 U. S. 262 (1932).

[17] Although the subject has received little analytical treatment, a valuable collection of documents is to be found in the *Hearings before the Committee on Patents*, United States Senate, 77th Congress, 2nd session.

No system of property accords rights which are absolute; any scheme bottomed upon the letter patent has its unique hazards. One is that the grant may be declared invalid. Against this the proper precaution is to quiet in advance all who are in a position to contest. The little fellow may be crushed; it may be better to take in the big concern or to buy it off. Litigation is a threat as well as a resort; the hazard, expense, delay, bother of a suit at law are enough to deter the faint-hearted; and, at a bout in court, the odds decidedly favor the party with the long purse. The second hazard is that the courts will not recognize as lawful all the conditions attached to a license. A rule of law, recently emphasized by our Supreme Court, holds that the person who has used his patent beyond the scope of the grant cannot sue for infringement.[18] Again, if the right to challenge be quieted in advance, the danger is removed. And private settlement, into which the rights of the public are not permitted to intrude, has become a dominant usage of the system. The third is the "limited time" for which the grant is made; for all rights which it conveys are quenched with its expiration. But, against even so serious a calamity, precautions can be taken. In advancing the art, the patent-owner has every advantage over the outsider. Improvements are themselves subject to patent. If a corporation is alert, it will see that novelties come along just fast enough to keep legal protection alive.

Against all such threats the fine art of "fencing" provides a stalwart defense. The up-to-date concern seeks to barricade its market alike against competition and legal attack. To that end it takes out scores, hundreds, if necessary even thousands, of patents. It may well be that the great mass of these could never survive judicial scrutiny. But that is of little practical importance; for, however weak they may be in the instance, they are formidable in the aggregate. It is a task of eternity for any court to work through the portfolio, item by item, to discover there a complete lack of legal authority for the business conduct in question.[19] And, in respect to the ruling on any patent, there is always the right of appeal. A licensee may be bound to fulfil the terms of his bondage until the patent is found invalid by the highest court in the land. Then, when the patent is pronounced void by a lower court, the owner finds no occasion to appeal. His contracts secure him his royalties and his controls; if he allows the case to go up, he may put everything in jeopardy. A note of pathos marks a certain letter in which a licensee

[18] *Morton Salt Co. v. Suppinger Co.*, 314 U. S. 488 (1942).

[19] *Walton Hamilton, Patents and Free Enterprise* (Monograph No. 31), Temporary National Economic Committee.

pleads for an easing of his feudal dues on the ground that the patent is invalid. How many systems of market rights rest upon counterfeit legal currency, it is impossible to say; for, where challenge has been stilled, the law has not yet sifted. In many instances the patent is needed only to do the pioneer work. Once the estate has come into being, the patentee is too firmly entrenched to be dislodged—or he may employ other devices to conserve the regimented market which he has won with the Government's grant.

It is easy to continue this recitation. An excursion into other trades will turn up other sanctions and other variations of the appropriated market. A copyright upon a sonnet, an essay, a history is one thing; a copyright of a musical score, a radio script, a motion picture has come to be something different. The trade-mark came into being in order that defective goods might be traced to their makers; it is currently used to guard the entrance to a market. So long as there is money to pound it into human heads that if it is not Bayer's, it is not aspirin, the name itself remains a market equity. As the courts are coming to frown upon mercantile equities based upon the patent grant, the trade-mark is being hurried into the breach. At the last session of Congress a bill which endowed the trade-mark with the attributes of the patent, narrowly failed of passage.[20] It offered rather more than has been lost; for the life of a patent is limited to seventeen years and the trade-mark is doomed for perpetuity. And, if copyright and trade-mark should fail in their proprietary office, there is no reason for despair. The ingenuity of a profession versed alike in the aspirations of business and the strictures of the law can rise to the occasion.

VII

The intent of these pages has been to depict a system of property, not in ultimate design, but in the process of emergence. An economy in rapid transition is reflected by these instances and their kind. As events with terrific impact beat upon industries, prudence unites with predation in a demand for shelter. The stranger threatens to horn in; so he must be kept off the preserves. The "chiseler" is a peril to the price-structure; so he must be disciplined and, if need be, abated. The unit—one of the many which make up the trade—becomes the corporate estate. It acquires a domain, develops a political order, seeks security through alliance, guards its industrial frontiers. As it takes the way of establishment, it

[20] S. 895, 77th Congress. The same bill, HR 82, has been introduced into the 78th Congress.

has to adjust itself to the state's oversight. It discovers, through craft and experience, that regulation is a two-edged thing. If the government imposes obedience, it creates a control that can be captured and put to use. It is a mark of swift change that the group which has cried loudest against state "interference" has been most active in capitalizing the restrictions imposed upon it. The market is possessed in the name of the very controls intended to protect the public interest.

When expediency is the architect, the creation forsakes institutions regarded as established. There is hardly an accepted opinion which it has not overridden or ignored. In the economy, competition is to be the rule and the burden of proof rests heavily upon any exception. In the state the power of police is to be limited to the public domain. The government may intrude to prevent fraud and the use of force, to set an ethical plane for commercial rivalry, to stimulate the market when it lags on the job, to protect weaker groups against the harshness of the struggle for existence. But it is to draw up sharp at the political frontier, for the decisions which affect the destinies of men and of companies are to be made in the arena of the market. In doing and in leaving undone, the separation of state and economy is taken for granted.

Yet events, such as those recited, have beaten upon this separation. In formal terms the state has had the better of the conflict. The march of statutes proclaims the dominance of the government over industry. In terms of reality its dominion over the corporate person is not so certain. If the two institutions had met head-on, there is little doubt of a public victory. But in actual fact the private interest meets, not the sovereign state, but one of its many agencies. At the point of contact its pressure is concentrated; that of the public widely diffused. So long as the corporation is looked upon as a private affair, it has access to information which the agency can secure only through courtesy, stealth or legal compulsion. The interest is always on the job, insistent with its pressures, alert to its fortunes. It has funds with which to buy talent, slant information, manufacture persuasion.

The clash, moreover, rarely appears as an issue in political theory. The private urge is not set over against the law's command; the expediences which business indulges are not tolerated or disallowed by reference to general criteria of public policy. Instead departure creeps in insiduously. The novelty appears off-stage, without notice to, or even the knowledge of, the agency of government most concerned. It becomes articulate in a series of moves, no one of which may be of such magnitude as to provoke an order to halt. And, as step follows step,

the event is well in sight before the leading question is put. General principles are helpless in the face of a distant, evasive, or poorly understood situation. The new institution appears, not as an act of conscious creation, but as a product of a series of little fudges. In the end the state accords tolerance to a thing which it never formally accepts.

Thus the rising schemes of market equities have appeared without benefit of law. Yet in their emergence they have not encountered its injunction. If a single word of description is to be used, they are in origin extra-legal, rather than legal or illegal. They represent the kind of usage of which the law itself is made and whose growth the law seems to invite. For the law is not a uniform command and Acts of Congress are not self-operative. Words are at best treacherous symbols; mandates are written in terms so large as to invite interpretation. The thou-shalts and thou-shalt-nots have their degrees of binding force. Any code is flexible enough to be bent; in time the novelty which lies beyond their language is certain to appear. Departures from the norms fixed for personal and corporate conduct are more numerous than officials can attend to. The instrument of enforcement called litigation is far too cumbersome for ordinary use. The forbidden novelty may appear beneath a conventional form; it may have made itself at home within the economy before its presence is detected. But existence is mightier than origin; the law itself must defer to usage which is vested.

But for a time all such equities occupy an anomalous position. They are accepted as property, not in their own right, but at a second remove. They are derivatives from, or equities grafted upon, other rights to which the state accords protection. It is the doctor's license to practice which allows him to care for the charity patient—and to mark up the rich man's bill in accordance with ability to pay. It is the inspector's certificate which by contagion makes legal the system of milk quotas. It is "the exclusive right" conferred upon the inventor which lends to the regimentation of a market whatever legality it possesses. But, at this stage of development, some other usage is necessary to secure the rights which the legal sanction fortifies. The code of ethics holds the cult of physicians to the sliding scale; marketing agreements between producers and distributors make the milk industry go; a short-circuiting of the courts by private settlement is a buttress to marketing empires founded upon the patent grant. In spite of the immunities at hand, there is still exposure to the law's attack. And the corporate persons concerned seek diligently to barricade their estates against judicial scrutiny.

But, for all that, recognition by circumlocution is not to be seriously

discounted. There are threats to be sure—a challenge at law, a judgment that a sanction is off its beat, the appearance of a competitor armed for a fight, the emergence of a superior technical process, a change in the wants of the people. But such moth and rust, with their corroding touch, are hazards to all that comes to market. Many rights whose existence are due to rigamarole and roundabout stand more firmly than others which have the legislature's overt approval. A sanction created by the legislature may be made to carry as far as a right which it vests. Action, as well as legal warrant, is essential to the maintenance of a property; and generous resources ingeniously used can be called upon to make good any deficit in the law's protection. To say that rights are exposed to attack along front or flank is not to distinguish them from other properties.

It often happens that the rights established are just a little different from those which the law allows. And often it is the law's inability to make good within its domain which leads to the trespass just outside of it. The grant of patent for an invention invites, not strict obedience, but graceful accommodation. The law allows an "exclusive right" to the "sole and true inventor" in the novelty he has created. The trouble is that, under current ways of research, in invention cannot be precisely defined. The patentee is not entitled to any equity in "the previous state of the art"; he has no claim to any antecedent scientific discovery. His franchise is limited strictly and precisely to his own contribution. It is not without difficulty that property is defined in respect to ponderables. Amid the intangibles of a developing industrial art the staking of personal claims is a perilous adventure. The minute domains at which the law aims are beneath the reach of any instrument of precision it can command. In respect to personal creation the law attempts what it cannot hope to accomplish.

To this lack of precision corporate executives adapt themselves as best they can. They are not concerned with patents, or even inventions, as such; they are intent upon the progress of the useful arts only as an aspect of the pursuit of gain. To that good end they wish to secure for themselves, and to deny to their competitors, access to technology. Grants from the Patent Office are usually somewhat broader than the law allows. But, save for pioneer inventions, even such catholic writs are rather too minute for practical purposes. So contracts for the use of inventions—assignment, license, lease, whatnot—are usually written in terms of a group of patents or even of an industrial process. As often as not such covenants extend to patents not yet applied for and even to

inventions not yet made. Thus equities pass easily, almost obviously, from novelties to processes, and from processes to industrial arts. And business usage, from the patent as a starter, comes to be concerned with rights in the market.

It is, of course, impossible to reduce all such equities in the market to a system. At the moment the "theologies" are under attack and even the neat articulation of the law of real property is beset by logic, semantics, and the higher legal criticism. Its discipline hangs heavy—far too heavy—over equities in intangibles; but its apparatus of fee simple, easement and contingent remainder is not adapted to the definition of new-fangled rights which in essence are pecuniary. We can, at best, distinguish designs in respect to industries and commodities. Electric power, glass containers, copper, whiskey, milk stand out rather distinctly. But the attempt to discover among these a common pattern encounters as many differences as likenesses. The automobile, news-gathering, cottonseed, boots and shoes, women's dresses, reveal far less distinct outlines. So long as industries differ in size, structure, sanctions within reach, places in the economy, tempos of development, it will be impossible to frame principles which are true in the aggregate as well as in the instance. And so long as other legal rights do vicarious duty for market equities, the "as if" of property-in-the-making does not invite strict formulation. It may well be that, unless and until the social order undergoes radical change, any attempt to generalize will have to be by industry or by area within the economy.

For the period just ahead the trend is towards an increase in such equities. The market was never quite the agency for the control of industry it was reputed to be. But as the separation of state and economy has broken down, its social office has experienced rapid decline. As it recedes, a number of other institutions—a man's right to his trade, the open door of industry, the mutuality of contract, the rule of competition, the consumer's legal protection—move towards eclipse. The war accentuates a movement long under way. Its requirements are being capitalized by the interests in the commonwealth which are already most strategically placed. Its czars, programs, priorities, allocations are moves towards the official recognition of corporate estates. And among the conditions which make such techniques imperative is the failure of a system—no longer to be called free enterprise—to smash the shackles which hold our capacity-to-produce in pecuniary bondage. The movement is progressive; the old restraints help to create the demand for the new regimentation.

As these controls—public and private—endure, they invite the further creation of property rights in the market. They serve as bulwarks against increases in capacity which might break price structures and wreck corporate estates. Even if, at the end of the war, industry is "demobilised," there will be no easy escape from the patterns they have inspired. A favored group does not willingly share its privileges with strangers; an interest that is vested does not highly resolve to unfrock itself. As we emerge from the lull in history called the nineteenth century, we may come to think of the free and open market as a quaint and old-fashioned thing. It would be bold to assert that free enterprise, a creation of petty trade, cannot survive the blows of modern technology. But things which are established have only their degrees of durability. And as, by grace of usurpation and the law, industrial imperia come into being, usages which are political in character compromise or supersede "the mechanistic action of economic forces." And, as the structure of the economy responds, the legal right to sell is being elaborated into an intricate and dominant institution.

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